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In the

Supreme Court of the United States

October Term, 1994

CENTER FOR AUTO SAFETY,

Petitioner,

v.

TYRAS ATHEY, Secretary of State of Maryland

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED FOR REVIEW

Maryland charges charitable organizations an annual registration fee based on the amount of the charity's *nationwide* public contributions, even if the charity is neither incorporated nor has a physical presence in the state and even if the charity's contact with Maryland is limited to solicitations conducted through the United States mail. The questions presented are:

1. Does Maryland's fee violate the Commerce Clause under cases such as *Complete Auto Transit v. Brady*, 430 U.S. 274 (1978), or may Maryland avoid review under *Complete Auto Transit* by labelling its fee a "user fee," even though the fee is not dependent on the extent to which a charity solicits in Maryland, and Maryland provides no facilities or services to assist charities in fundraising?

2. May a state, consistent with the First Amendment, charge charities an annual registration fee based solely on the charity's *nationwide* solicitation activities?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those set forth in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Fee System Under Challenge 4
B. Petitioner's Fundraising Activities 6
C. The Development of the Record Below 8
D. The Decisions Below 10

REASONS FOR GRANTING THE WRIT 11

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S "USER FEE" CASES. 12

II. THE DECISION BELOW ALSO CONFLICTS WITH THIS COURT'S FIRST AMENDMENT RULINGS. 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page**

ASARCO, Inc. v. Idaho Tax Comm'n, 458 U.S. 307 (1982) 19

Allied Signal, Inc. v. Director, 112 S. Ct. 2251 (1992) 14, 19

American Trucking Associations v. Schneider, 483 U.S. 266 (1987) 14, 17, 18

Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) 16

Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n, 296 U.S. 261 (1935) 16

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 11, 14, 15

Complete Auto Transit v. Brady, 430 U.S. 274 (1978) . . . . . *passim*

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983) 14

Cox v. New Hampshire, 312 U.S. 569 (1941) . 11, 22, 23

Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983) 23

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972) 11, 15

Fernandes v. Limmer, 663 F.2d 619 (5th Cir. Unit A 1981), *cert. dismissed*, 458 U.S. 1124 (1982) . . . 23

Follett v. McCormick, 321 U.S. 573 (1944) 20

Forsyth County, Ga. v. Nationalist Movement, 112 S. Ct. 2395 (1992) 20

Goldberg v. Sweet, 488 U.S. 252 (1989) 18

Interstate Transit, Inc. v. Lindsay, 283 U.S. 183 (1931) 16

J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) . 18

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 19

Morf v. Bingaman, 298 U.S. 407 (1936) 16

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 21

NAACP Legal Defense & Educational Fund v. Cornelius, 473 U.S. 788 (1985) 16

National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967) 13

Northwest Airlines, Inc. v. County of Kent, 114 S. Ct. 855 (1994) 15

Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) . 13

Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) 9, 20

Sentinel Communications Co. v. Watts, 936 F.2d 1189 (11th Cir. 1991) 23

South-Suburban Housing Ctr. v. Board of Realtors, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 971 (1992) 23

United States v. Sperry Corp., 493 U.S. 52 (1989) . . . 18

Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 20

Statutes

Ohio Rev. Code Ann. § 1716.02(D) (1994) 7

M.G.L.A. 12 § 8F (1994 Supp.) 7

10 P.S. § 162.5(p) (1994 Supp.) 7

Code of Virginia § 57-49E (1994 Supp.) 7

Md. Bus. Reg. Code § 6-406 6

Md. Code Ann. art. 41, § 3-202(g) . . . . . *passim*

N.C.G.S. § 131F.8 (1994 Cumulative Supp.) 7

T.C.A. § 48-3-504(b) (1994 Supp.) 7

In the

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OCTOBER TERM, 1994

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CENTER FOR AUTO SAFETY,
Petitioner,

v.

TYRAS S. ATHEY, in his capacity
as Secretary of State of Maryland,
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Petition for Writ of Certiorari to the
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for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is officially reported at 37 F.3d 139 and is reproduced in the Appendix at 1a-14a. The memorandum opinion of the District Court for the District of Maryland, entered on September 28, 1993, is officially reported at 866 F. Supp. 237 and is reproduced in the Appendix at 15a-26a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on October 6, 1994. By Order dated December 28, 1994, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 3, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution, Art. I, § 8, cl. 3, provides that:

> The Congress shall have Power * * *
>
> > To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ..

The First Amendment to the Constitution provides that:

> Congress shall make no law * * * abridging the freedom of speech, * * *, or the right of the people peaceably to assemble . . ..

The relevant provisions of the Maryland Charitable Organization Solicitations Law are as follows:

> § 3-202. Registration of charitable organizations; required reports.
>
> (a) Every charitable organization located within this State which intends to solicit contributions within or without this State, or every charitable organization which intends to solicit contributions within the State or to have funds solicited on its behalf shall file a

> registration statement with the Secretary of State . . . prior to or upon the commencement of any solicitation.
>
> § 3-202(g)(1) Every charitable organization under this subtitle which files a separate registration statement shall pay an annual fee based upon the level of public contributions collected. The annual fee due is as follows:

Level of Public Contributions	Annual Fee
At least $25,000 but less than $50,001	$ 50
At least $50,001 but less than $75,001	$ 75
At least $75,001 but less than $100,001	$100
$100,001 and above	$200

STATEMENT OF THE CASE

This petition seeks review of the Fourth Circuit's decision upholding the constitutionality of a provision of the Maryland Charitable Organization Solicitations Law ("the Law"), Md. Code Ann. art. 41, § 3-202(g), that requires charities soliciting donations in Maryland to pay an annual registration fee to the state in an amount based on their total *nationwide* public contributions — not simply the contributions obtained from Maryland residents. This sliding-scale fee does not depend on the level of any benefits conferred on charities by the state or on the expenses incurred by the state in administering or enforcing the Law. Instead, it operates as a progressive tax on a charity's nationwide gross receipts. The fee burdens the interstate exchange of constitutionally protected communications and, as more states adopt similar fees, impairs the ability of charities to contact their supporters and would-be supporters throughout the nation. For these reasons, Maryland's fee

violates both the Commerce Clause of Article I and the First Amendment.

A. The Fee System Under Challenge

Maryland, like many states, regulates charitable organizations that solicit donations within the state. Maryland's Law requires every charity that intends to solicit contributions in Maryland in any manner (in person, by telephone, or, like petitioner, only through the United States mail) to file a registration statement with the respondent Secretary of State before commencing solicitation and thereafter to file annual reports. Md. Code Ann. art. 41 § 3-202. The Law also requires charities to make certain disclosures to the public, *id.* § 3-205, to keep accurate fiscal records, *id.* § 3-210, and not to engage in fraud, misrepresentation, or deceptive and misleading practices, *id.* § 3-212(b)-(f).

Petitioner does not question the substance of Maryland's regulation of charities. Rather, this case focuses solely on Maryland's effort to exact fees from charities based on their nationwide receipts, instead of their Maryland-based revenues. This challenge arises out of the amendment to the Law, effective July 1, 1989, which revised the fee system to raise more revenue for the state in a manner that discriminates against out-of-state charities.

Before 1989, charities that raised in excess of $25,000 nationwide and solicited in Maryland were required to pay the state a flat annual fee of $50. After the Secretary of State advised the legislature that this flat fee did not generate enough revenue to make Maryland's regulation of charities self-sustaining, the legislature imposed a sliding-scale fee. Under the new system, the fee is based on the total amount of "public contributions" that a charity receives *nationwide* (indeed, worldwide), regardless of the amount, however trivial, it receives from Maryland residents. Charities that annually receive nationwide public contributions of less than

$25,000 need pay no fee; those that receive $25,000 to $50,000 in contributions must pay an annual fee of $50; those that receive $50,001 to $75,000 must pay an annual fee of $75; those that receive $75,001 to $100,000 must pay an annual fee of $100; and those that receive annual nationwide contributions of $100,001 or more must pay an annual fee of $200. Md. Code Ann. art. 41, § 3-202(g).

The amount or percentage of contributions that a charity obtains from Maryland residents is irrelevant. For example, a local charity that raises $24,500, all from Maryland residents, pays no registration fee. Yet a large, out-of-state charity that operates nationally, but raises only a very small amount from Maryland residents — as little as one dollar — must pay a registration fee of $200. The new fee system thus penalizes larger, out-of-state charities that do little fundraising in Maryland and subsidizes smaller local charities that do all or most of their soliciting in the state.

The legislative history of the fee amendment makes clear that this sliding-scale system was adopted in place of a flat fee because it operates in the manner of a corporate income tax. According to the justification memorandum submitted to the legislature by the Secretary of State, "[t]he sliding fee is warranted so that organizations which are best able to pay will be required to pay the higher fees, and those with limited income will bear a lighter burden." There is no evidence that anyone in the state's executive or legislative branch ever assessed whether the state's costs in administering the Law actually increased as a charity's nationwide contributions increased. Nor is there any evidence that the fee formula was based on even an estimate of the state's actual costs with regard to charities of different sizes.

Under the Law, payment of the registration fee is an essential precondition to a charity's right to solicit in the state. The Law requires the Secretary of State to deny registration to a charity that fails to correct deficiencies in its registration materials or pay the fee, Md. Code Ann. art. 41

§ 3-202(d)(3)(i), and a charity whose registration has been denied may not solicit contributions in Maryland, *id.* § 3-202(d)(2). If a charity solicits in violation of the Law, the Secretary may seek a court order barring solicitation by that charity. Md. Bus. Reg. Code § 6-406. As additional remedies, the Secretary may cancel the charity's registration, refer the matter to the Attorney General for civil enforcement, and/or to the appropriate State's Attorney for criminal prosecution. *See* Md. Code Ann. art. 41 § 3-214(c).

B. Petitioner's Fundraising Activities

Petitioner Center for Auto Safety ("CAS") is one of the out-of-state charities adversely affected by the new fee system. CAS is a non-profit advocacy organization founded in 1970 to give consumers a national voice in the struggle for improved automobile safety, efficiency, and quality. CAS' activities include researching automotive safety issues, testifying at public hearings, filing administrative petitions, providing information through the media, and distributing books and other publications. CAS is qualified as a charity under section 501(c)(3) of the Internal Revenue Code.

CAS obtains public contributions through its direct-mail fundraising program, but not through door-to-door or telephone solicitations. CAS' mailings typically contain information about a variety of automobile safety issues. The funds obtained through this direct-mail fundraising are vital to CAS' continued ability to work for improved automobile safety.

CAS is incorporated in the District of Columbia and maintains no physical presence in Maryland. Its only fundraising contacts with residents of Maryland take place through the mail, and its fundraising from Maryland residents is quite small, both absolutely and as a percentage of its total national activities. CAS' annual contributions from Maryland residents have never exceeded $16,000, and,

since 1989, its annual contributions from first-time Maryland contributors have never exceeded $2,000. Thus, if Maryland's fee system were based on in-state contributions rather than total worldwide contributions, CAS would not have to pay any registration fee at all, since CAS regularly raises less than $25,000 from Maryland residents. In addition, because charities that solicit only from their members are exempt from the Law, Md. Code Ann. art. 41, §3-203(3), and because CAS raises at most $2,000 from individuals in Maryland who are not already members, CAS must in effect pay $200 to raise $2,000 or less.

While a $200 fee may not, in and of itself, seem like a substantial barrier to the solicitation of funds, other states are now basing their fees on nationwide public contributions.[1] If every state established a fee system identical to Maryland's, then CAS would have to pay $10,000 annually for the right to engage in the fundraising that is the lifeblood of its advocacy. Moreover, Maryland and other states may well increase these fees in the future if they decide to expand their oversight of charities or to pass on additional, existing costs to charities. Given CAS' dependence on public contributions, it would have to choose between paying these higher fees or foregoing the solicitation of funds from the public in many states. Either course would significantly

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[1] *E.g.*, Massachusetts (up to $250), *see* M.G.L.A. 12 § 8F (1994 Supp.); North Carolina (up to $200; up to $400 if charity has branch offices), *see* N.C.G.S. § 131F.8 (1994 Cumulative Supp.); Pennsylvania (up to $250), *see* 10 P.S. § 162.5(p) (1994 Supp.); Tennessee (up to $200), *see* T.C.A. § 48-3-504(b) (1994 Supp.); Virginia (up to $325), *see* Code of Virginia § 57-49E (1994 Supp.); *but see* Ohio Rev. Code Ann. § 1716.02(D) (Baldwin 1994) (fee schedule based solely on *in-state* contributions). Moreover, because state registration and reporting requirements vary considerably, there are significant transaction costs in preparing the requisite filings. Consequently, the $200 fee at issue here is just the tip of the iceberg.

impair CAS' ability to engage in public education and conduct advocacy on behalf of its members and the public.

C. The Development of the Record Below

CAS filed this action in the United States District Court for the District of Maryland on March 6, 1992, alleging that Maryland's fee system violated the First Amendment and the Commerce Clause of the United States Constitution. CAS took discovery on a number of issues, including whether (a) the state executive or legislative branch had ever determined, prior to the enactment of the sliding-scale fee, whether the state's costs in administering the Law increased as a charity's nationwide level of contributions increased; and (b) the fee schedule was calibrated to reflect even an estimate by the state of its actual costs with regard to charities of different sizes. In addition, CAS sought to determine whether the revenue generated by the fee exceeded, or was equal to, the state's expenditures.

The state's discovery responses confirmed that the legislature did not have before it *any* estimates of the state's costs regarding charities of different sizes, let alone information regarding whether the state's costs of administering its Law increased as a charity's level of contributions increased. Although the state initially conceded that the revenues generated by the fee exceeded its expenses, it twice revised its discovery responses until, not surprisingly, it ultimately contended that its revenues were slightly below its expenditures, which included, among others, its personnel costs, telephone, postage, and a portion of the salary of the Secretary and Deputy Secretary of State, to reflect the time they spend overseeing the Charitable Division.

After discovery was concluded, the parties cross-moved for summary judgment. On the Commerce Clause claim, CAS argued that the fee system failed the four-part test established in *Complete Auto Transit, Inc. v. Brady*, 430

U.S. 274 (1978), governing state taxation of interstate commerce. *Complete Auto Transit* establishes a rigorous standard for reviewing state charges on interstate activities because of the potential for one state to stymie commerce through discriminatory or burdensome taxes. CAS urged, among other things, that the fee could not survive the *Complete Auto Transit* test because it was not fairly apportioned to cover only those contributions received by CAS from Maryland residents. Thus, Maryland effectively forced out-of-state charities like CAS to subsidize in-state charities by requiring out-of-state charities to bear a greatly disproportionate share of the state's expenses in enforcing the Law. On the First Amendment claim, CAS emphasized that the fee system could not be upheld as "narrowly tailored," as required by cases such as *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), because the state had not shown any correlation between the sliding-scale fee formula and the costs the state incurs regulating charities with differing levels of contributions.

With respect to the Commerce Clause claim, the state argued principally that the fee should be upheld as a form of "user fee," because the sliding-scale fee bore a fair connection to benefits provided to charities by the state. The state did not contend that it provided CAS with any facilities or services for which it was entitled to exact a charge; rather, it sought recompense for its regulatory work in monitoring the charities' registration statements and in responding to requests for information from the public. Nor did the state dispute that the fee system required charities like CAS to pay an amount that was greatly disproportionate to the level of their fundraising activities within the state.

The state's principal contention with respect to the First Amendment claim was that the Law is "narrowly tailored" because the cost of processing registration and renewal materials varied with the amount of the charity's public contributions, since charities that receive more than $100,000 annually are required to submit more materials, such as

audited financial statements, than are smaller charities. But the state offered no evidence as to the amount of those additional costs or their relation to the fee schedule. Nor did the state explain how its defense justified the rest of the sliding-scale fee structure, which also imposes differing fees at the levels of $25,000, $50,000, and $75,000. Most critically, the state conceded that the state legislature had considered none of these factors when it enacted the fee schedule and that it had approved the sliding-scale fee simply to raise more revenue.

D. The Decisions Below

On September 28, 1993, the district court granted the state's motion for summary judgment and denied CAS' motion for summary judgment. App. 15a. On the Commerce Clause claim, the district court held that, because the fee schedule was enacted to meet the state's costs in policing charities, it could be sustained as a "user fee for a service provided by the state." App. at 21a. The court, however, did not address any possible justification for the levels comprising the fee formula. As to the First Amendment claim, the court held that, because the state's revenue does not exceed its expenses, the fee is drawn with adequate precision. App. 20a-21a.

The Fourth Circuit affirmed. Addressing the Commerce Clause issue first, the court determined that the fee is a "user fee" not subject to "the stringent standard" of review under the Commerce Clause, as required by *Complete Auto Transit v. Brady*, 430 U.S. 274 (1978). App. 6a. The court recognized that this Court has held, in several cases, that "user fees" are limited to those charges "collected by the state as reimbursement for use of state-owned or state-provided facilities or services," App. 6a (citations omitted), and that the fee here is "not the typical user fee." App. 9a. Nonetheless, the court concluded that the fee "fits comfortably within the user fee category" because "charities seeking

to solicit in Maryland use the state's apparatus for regulating charities and, as a result, derive a benefit, namely the privilege of soliciting in Maryland where donor confidence is enhanced owing to the state's regulation of charities." App. 9a-10a (footnotes omitted). Evaluating the fee under the more lenient user fee standard set out in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), the court held that the sliding-scale fee is a "fair, if imperfect, approximation of Maryland's costs," that did not discriminate against out-of-state charities because, for example, "all charities generating $50,000 in nationwide contributions are subject to the same registration fee." App. 8a-9a.

Examining CAS' First Amendment argument, the court recognized that CAS' solicitation activities "fall[] within the scope of First Amendment protection." App. 11a-12a (citations omitted). However, the court held that the fee was not imposed to generate revenue, but rather was a narrowly tailored means of defraying the expenses incident to the maintenance of public confidence in the solicitation process, and hence was lawful under cases such as *Cox v. New Hampshire*, 312 U.S. 569 (1941). App. 13a-14a.

REASONS FOR GRANTING THE WRIT

This Court should grant review because the decision below directly conflicts with this Court's Commerce Clause decisions. The Fourth Circuit's unprecedented expansion of the "user fee" concept cannot be reconciled with this Court's decisions strictly limiting that doctrine to instances in which the fee being exacted provides fair reimbursement for use of state-owned or state-provided facilities or services. *E.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). To hold, as did the Fourth Circuit, that general law enforcement activities constitute a state service for which a user fee may be charged is to lift all restraint from the user fee doctrine and to blur, if not eradicate altogether, the

distinction between general taxes and user fees. If the Fourth Circuit's decision is allowed to stand, there will be virtually no governmental service — ranging from highway patrols to securities and insurance regulation — that would not potentially be subject to user fees, calculated on the basis of the regulated entity's *nation*wide activities and therefore open to exactions that impede and discriminate against interstate commerce.

The mischief that will result from the decision below is heightened by the fact that the "commodity" being regulated by Maryland is the expression of CAS' First Amendment rights. It is doubtful that a state has any business at all imposing burdensome restrictions on out-of-state charities whose only contact with the state comes through the United States mail. But even assuming that a state may impose some such burdens, this Court's First Amendment cases concerning state regulation of charitable solicitation activities require that any burden imposed be narrowly tailored to reflect a substantial state interest. Maryland's sliding-scale fee cannot satisfy that demanding test. In essence, the courts below held that it was acceptable for the Maryland legislature to impose a sliding-scale fee formula, even though Maryland made no effort to ascertain the connection (if there is any) between the levels in the fee schedule and the state's regulatory costs. Because the First Amendment requires far greater precision of regulation, this aspect of the decision below also warrants review.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S "USER FEE" CASES.

The fundamental error committed by the court below is its conclusion that Maryland's charitable registration fee is appropriately characterized as a "user fee" for the purpose of the Commerce Clause, instead of a more general tax or fee. As the court itself recognized, and the state virtually conceded, that determination was critical, since the fee could

not possibly survive review under the strict standard laid out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

For nearly two decades, this Court has uniformly applied the *Complete Auto Transit* test in evaluating state-imposed charges on interstate commerce, unless the state could show that its charge was carefully calibrated only to reimburse the state for the cost of providing a specific facility or service — or satisfied the narrow "user fee" exception. Any non-user fee charge may survive Commerce Clause scrutiny only if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to services provided by the State." 430 U.S. at 279.[2]

Maryland's fee cannot survive this test. As to the first prong, this Court has long held that the Commerce Clause prohibits the imposition of a tax on out-of-state entities whose sole contacts with a state, as in this case, are by mail or common carrier. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 758 (1967); *see also Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1912-14 (1992). Maryland's fee also completely fails the second requirement, that the fees levied on interstate commerce be fairly apportioned. Maryland has done precisely what the Commerce Clause forbids: tax value earned outside its borders, without any apportionment or credit, thereby

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[2] The Court has explained that the potential for discrimination against out-of-state entities is far less intense where the fee at stake is simply one calculated to defray the cost to the state of providing a specific facility or service. *See generally Complete Auto Transit*, 430 U.S. at 281-88. That rationale, of course, does not extend to situations like the one involved in this case, where there is no tangible or discrete facility being used or service being provided.

subjecting CAS to multiple taxation. *Allied Signal, Inc. v. Director*, 112 S. Ct. 2251, 2258 (1992); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). Finally, Maryland's fee structure violates the fourth step of the *Complete Auto Transit* test, which requires that the fee charged be "fairly related to the services provided by the state." Maryland's registration fee was not designed to compensate the state for services that it provides to charities, but was intended to provide financial support for the state's policing and registration of charities. Put simply, the charge does not "vary directly ... with some ... proxy for value obtained from the State," as the Commerce Clause requires. *American Trucking Associations v. Schneider*, 483 U.S. 266, 291 (1987).

Recognizing that the Maryland fee could not survive the rigorous *Complete Auto Transit* analysis, the court below shoe-horned the Maryland fee to fit within the narrow "user fee" exception, even though it recognized that the Maryland fee is "not the typical user fee," since Maryland provides CAS neither the use of a state-owned facility or a "service" to assist CAS' solicitation efforts. App. 9a. The Fourth Circuit's ruling is in direct conflict with this Court's user fee jurisprudence.

For example, the court cited *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), which upheld Montana's coal severance tax, but that case only illustrates the flaws in the court's conclusion that the registration fee here is a user fee. In *Commonwealth Edison*, this Court explained that it would not review Montana's tax under a user fee standard because that standard applies only when a state seeks to recover the costs of operating a specific state facility, not when a state is raising money for the general support of the government:

> in reviewing appellant's contention, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were

> designed and defended as a specific charge imposed by the State *for the use of state-owned or state-provided transportation or other facilities and services.*

453 U.S. at 621 (emphasis added and citations omitted). In an adjoining footnote, the Court emphasized that its user fee cases were limited to situations where "such charges are purportedly assessed to reimburse the State for costs *incurred in providing specific quantifiable services.*" *Id.* at 622 n.12 (emphasis added). The Court then cited with approval an article characterizing user fees as charges "of the nature of a rent charged by the State, based upon its *proprietary interest in public property* [rather] than that of a tax, as that term is thought of in a technical sense." *Id.* (emphasis added).

The holding of *Commonwealth Edison* is in accord with this Court's other decisions which have sustained user fees where the State has shown that the charge is designed to reimburse it for the cost of providing affirmative services or making state-owned facilities available. Thus, in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), this Court upheld a $1.00 head tax imposed on passengers embarking from a commercial airport, stressing that the charge was designed "only to make the user of state-provided facilities ... help defray the costs of their construction and maintenance," *id.* at 714, and reasoning that "'[w]here a State at its own expense furnishes special facilities [*i.e.*, the airport] for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor.'" *Id.* at 712-13 (citation omitted). *Accord Northwest Airlines, Inc. v. County of Kent*, 114 S. Ct. 855, 864 (1994) (upholding rents charged by municipality for use of airport facilities; under "user fee" standard, a levy

is reasonable if it is "based on some fair approximation of *use of the facilities*") (emphasis added).[3]

Contrary to the holding below, the registration fee that Maryland imposes on charitable solicitation cannot plausibly be characterized as a "user fee." CAS and other charities that only send direct-mail solicitations to Maryland residents do not "use" any state-owned or state-operated facilities in their solicitations. The State of Maryland does not make anything "available" to charities for their use in the printing or distribution of their literature or in the delivery of the contributors' checks to the charities. Nor does Maryland assist CAS in finding donors who might be supportive of CAS' mission by providing a forum for CAS' fundraising. *Cf. NAACP Legal Defense & Educational Fund v. Cornelius*, 473 U.S. 788 (1985). The only governmental facility which CAS "uses" in contacting its Maryland prospects is the United States mail, and, of course, it does pay a "user fee" for its fair share of the use of the mails, in the form of postage.[4]

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[3] *See also Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 262 (1935) (permitting state to impose charge for use of harbors and seaports that it owned and operated); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) (upholding charges for maintenance of state-owned roads); *Morf v. Bingaman*, 298 U.S. 407 (1936) (same); *Interstate Transit, Inc. v. Lindsay*, 283 U.S. 183, 190 (1931) (holding unconstitutional tax imposed on interstate buses, stating that "the charge must necessarily be predicated upon the use made, or to be made, of the highways of the state").

[4] Because the amount of the fee is not at all dependent on the extent to which a charity actually "uses" Maryland-provided services (it makes no difference if CAS sends one letter or a million into Maryland), the fee is really being levied for the *privilege* of soliciting Maryland residents. Indeed, the Fourth

(continued...)

Notwithstanding its recognition that Maryland's fee is "not the typical user fee," the Fourth Circuit concluded that the charge qualified as a user fee because Maryland confers on CAS the "privilege of soliciting in Maryland where donor confidence is enhanced owing to the state's regulation of charities." App. 10a (footnote omitted). This holding is seriously flawed, and, if allowed to stand, will create havoc for entities, like charities, that are regulated by multiple jurisdictions.

Perhaps the signal defect in this holding is that it has no logical stopping point, and, if accepted, would eviscerate the Commerce Clause's protection against burdensome and discriminatory treatment of interstate commerce. Under the Fourth Circuit's rationale, user fees could be charged for *any* governmental service so long as the state could claim that the public's "confidence is enhanced owing to the state's regulation." Thus, for example, a state agency that regulates consumer product safety could require all manufacturers to pay a "user fee" calculated according to the number of products sold nationwide in order to support the state's monitoring of the product's safety. Similarly, a state securities commission could force firms offering stock for sale within the state to pay a user fee based on their nationwide sales, on the ground that the fee would enable the state to monitor stock sales and therefore inspire confidence in the firms' integrity. The same would be true for state insurance commissions, which would be free to charge

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[4](...continued)
Circuit acknowledged as much. App. 10a (reasoning that the "benefit" charities derive from the fee is the "privilege of soliciting in Maryland"). This Court in *American Trucking* drew a clear dividing line between privilege fees and user fees, and condemned the former because they impose an undue burden on interstate commerce. *American Trucking*, 483 U.S. at 290-92, *citing Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting).

"registration" fees based on the companies' nationwide business. In short, there is no principle limiting the scope of the Fourth Circuit's new "user fee" test.

Even though all these hypothetical charges would have the practical effect of gross-receipts taxes, which must be fairly apportioned under the Commerce Clause, *see Complete Auto Transit*, and *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), the holding below allows states to escape the constraints of the Constitution merely by labelling their taxes as user fees. The Fourth Circuit's ruling goes far beyond any of the Court's user fee cases and would drain all the force from the most important restraints on state taxation — the apportionment requirement of the Commerce Clause.

American Trucking Associations v. Schneider, 483 U.S. 266 (1987), further underscores the conflict between the ruling below and this Court's precedents. *American Trucking* reaffirmed the general principles that, to satisfy the Commerce Clause, a state-imposed charge on interstate commerce must be carefully apportioned to take into account the out-of-state taxpayer's contacts with the taxing state, and that a tax may not be upheld "merely because the particular formula by which its charges are reckoned extends the same nominal privilege to interstate commerce that it extends to in-state activities." *Id.* at 296. *American Trucking* has repeatedly been cited in subsequent cases for the fair-apportionment requirement of the Commerce Clause. *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989); *Goldberg v. Sweet*, 488 U.S. 252, 261-62 (1989). Most notable is *Sperry*, where the Court, in rejecting a claim under the Takings Clause, expressly distinguished *American Trucking* on the ground that it was decided under the Commerce Clause, which imposed the more "exacting requirement" of "internal consistency" on state charges imposed on interstate commerce. *See Sperry*, 493 U.S. at 61 n.7.

The fair apportionment requirement of the Commerce Clause is crucial to this case, which presents a classic example of a state's effort to tax value beyond its borders — a practice this Court has uniformly condemned. *See Allied-Signal, Inc. v. Director*, 112 S. Ct. 2251, 2258 (1992); *ASARCO, Inc. v. Idaho Tax Comm'n*, 458 U.S. 307, 315 (1982); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979). If the decision below stands, then there is no reason why every other state would not impose exactly the same sort of fee that Maryland has, and indeed, many other states have done so. *See* n.1, *supra*.

Not only is the multiple taxation problem rife under the Fourth Circuit's approach, but there is also no reason to believe that the current $200 ceiling will remain the limit; fees of $500, $1,000, or even higher could become the norm. Under the Fourth Circuit's reasoning, so long as there is a fair correlation between the fees charged and the amount the state spends administering the law, the fee is valid. Although Maryland now includes only the direct expenses incurred by its Charitable Division, it could easily add proportionate shares of fixed or capital costs (building, janitor, assistance by the Attorney General's Office, the Governor, police and fire protection, and so forth). Moreover, Maryland could substantially increase the scope of its regulatory activities (if for no other reason than to create jobs for state residents), and pass these costs on to out-of-state charities that, unlike their Maryland-based counterparts, have little clout before the Maryland legislature. And, of course, other states could, and likely would, follow suit, especially in these days of state budget deficits. As a result, charities' donations would be effectively taxed many times over, to their detriment and in derogation of basic tenets of Commerce Clause jurisprudence. Because of the importance of this issue, and the Fourth Circuit's clear departure from prior precedent, the Court should grant review.

II. THE DECISION BELOW ALSO CONFLICTS WITH THIS COURT'S FIRST AMENDMENT RULINGS.

The Commerce Clause violation would be serious enough if CAS were merely selling soap flakes, stocks, or soda pop, but here CAS is seeking to disseminate ideas and raise funds for charitable and educational purposes. This Court has long made clear that "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious ... as the imposition of a censorship or a previous restraint." *Follett v. McCormick*, 321 U.S. 573, 577 (1944). In case after case, the Court has stressed that "charitable appeals for funds are within the protection of the First Amendment," and has struck down those schemes that threaten to interfere with protected activity. *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); *accord Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395 (1992); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988). Because burdensome fees seriously impair the ability of charities like CAS to make their views known to the American public, Maryland's fee "cannot be sustained unless it serves a sufficiently strong, subordinating interest that the [state] is entitled to protect;" in short, "'[p]recision of regulation must be the touchstone.'" *Schaumberg*, 444 U.S. at 636-37 (citation omitted).

In its opinion, the Fourth Circuit recognized the applicability of these general principles, but failed to subject the Maryland fee to the meaningful scrutiny demanded by this Court's First Amendment precedents. Indeed, the Fourth Circuit said nothing about the sliding-scale nature of the fee, apart from the its observation that the "fees are calibrated to approximate the costs of administering the Statute, and the revenues raised ... do not exceed these costs." App. 14a. This description may be correct as applied to the total fees, but it leaves wholly unaddressed the

justifications for the levels making up the fee formula; all it reflects is that the Secretary of State believed that, *overall*, the fee formula would make his office self-sustaining. The only justification ever put forward for the sliding scale is that it enabled the State to tax larger entities more heavily, but that only exacerbates, rather than eliminates, the First Amendment problems, since this Court has made plain that states may not levy a "tax" on "the exercise of a privilege granted by the Bill of Rights." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).

By failing to look more closely at the nature of the fee, the Fourth Circuit essentially held that, so long as a state does not make a net profit from its fee system, then that system passes First Amendment muster, regardless of the fairness of the components of the fee system or the potential impact on any particular charity's ability to engage in its First Amendment right to solicit. That is not the law, however, as a simple example illustrates.

Assume that a municipality spent a total of $250,000 in policing and maintenance of the streets during public parades each year. Assume further that the municipality decided to recoup its costs by charging parade groups a permit fee based not on the estimated number of marchers in a particular parade (which might have some relation to the city's costs in assuring public safety), but on the group's membership. Because a fee assessed in that manner would place an oppressive burden on the First Amendment rights of the organization and would be astronomically disproportionate to the state's costs in policing the march, this Court would have no trouble finding such a fee unconstitutional. Not only does the Maryland fee suffer from this flaw, but the problem is compounded where, as here, the sponsoring organization is a national one, which has only a small fraction of its members in-state, and the fee is exacted on the basis of the organization's nationwide — not in-state — membership.

Maryland's sliding-scale is no different analytically from that hypothetical. It has the very real potential to

suppress the circulation of ideas by out-of-state charities because it charges them such a disproportionate amount to make their views known and to solicit in Maryland. In CAS' case, the fee formula effectively forces it to spend $200 to raise at most $2,000 from Maryland residents. If other states continue to follow Maryland's lead, then charities will undoubtedly limit the number of states in which they solicit the public, diminishing the First Amendment rights of both the charities and the public.[5]

The Fourth Circuit's reliance on *Cox v. New Hampshire*, 312 U.S. 569 (1941), shows just how far the court's analysis strayed. *Cox* involved a situation where the permit fee was carefully calibrated to reflect the state's expenses in policing particular parades:

> There remains the question of license fees which, as the [state] court said, had a permissible range from $300 to a nominal amount. ... "The charge," said the [state] court, "for a circus parade or a celebration processession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession, to which the charge would be adjusted."

Id. at 576-77. *Cox* upheld the sliding-scale fee in that situation precisely because it did take into account the costs generated by each parade, and was thus superior to a flat fee, which "fails to take account of the difficulty of the framing

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[5] Indeed, when added to CAS' other fundraising expenses — postage, printing, and mailing list rental — the $200 fee can have a significant impact on whether CAS breaks even on its Maryland mailings or loses money.

of a fair schedule to meet all circumstances." *Id.* In contrast to *Cox*, Maryland's fee system imposes the same fee on charities above a certain size, without any evidence that charities which raise most of their money out-of-state impose similar costs to those whose activities are focused in Maryland, or that the higher fees are justified in relation to the fees charged to smaller charities.

Not only is the Fourth Circuit's holding on the First Amendment issue — that so long as the fee bears a reasonable relationship to the state's *overall* expenses it passes muster — inconsistent with this Court's precedent; it also conflicts with the rulings of other Circuits which have been called upon to assess the constitutionality of similar fees. Other courts have subjected such licensing fees to exacting scrutiny and have struck down those schemes that posed a threat of interfering with protected activity. *E.g.*, *South-Suburban Housing Ctr. v. Board of Realtors*, 935 F.2d 868, 897-98 (7th Cir. 1991) ($60 permit fee for display of residential "for sale" sign), *cert. denied*, 112 S. Ct. 971 (1992); *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1055-57 (2d Cir. 1983) ($100 administrative fee imposed on those seeking to use publicly-owned rail-bed for parade); *Fernandes v. Limmer*, 663 F.2d 619, 632-33 (5th Cir. Unit A 1981) ($6 daily license fee for soliciting at airport), *cert. dismissed*, 458 U.S. 1124 (1982); *see also Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1205-06 (11th Cir. 1991) (questioning 5 cents-per-newspaper administrative fee imposed on the use of newsracks in public rest areas). The Fourth Circuit's failure to apply the rigorous analysis required by settled precedent creates a sharp division among the circuits, which further underscores the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted, and this case set for plenary briefing and argument.

Respectfully submitted,

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February 3, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CENTER FOR AUTO SAFETY, INCORPORATED, *Plaintiff-Appellant*,	)	
	)	No. 93-2417
v.	)	
TYRAS ATHEY, Secretary of State of Maryland, *Defendant-Appellee*.	)	

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Benson E. Legg, District Judge.
(CA-92-637-L).

Argued: May 9, 1994

Decided: October 6, 1994

Before WILKINS and HAMILTON, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Ellis wrote the opinion, in which Judge Wilkins and Judge Hamilton joined.

COUNSEL

Argued: David Charney Vladeck, PUBLIC CITIZENS LITIGATION GROUP, Washington, D.C., for Appellant. Andrew Howard Baida, Assistant Attorney General, Baltimore, Maryland, for Appellee. On Brief: Paul R.Q. Wolfson, Alan B. Morrison, PUBLIC CITIZENS

LITIGATION GROUP, Washington, D.C., for Appellant. J. Joseph Curran, Jr., Attorney General of Maryland, Marlene Trestman, Assistant Attorney General, Baltimore, Maryland, for Appellee.

OPINION

ELLIS, District Judge:

In this appeal, we consider the constitutionality of Maryland's Charitable Organizations Solicitation Law, Md. Code Ann. Art. 41, § 3-202(g) ("the Statute"), which requires each non-exempt charity seeking to solicit in Maryland to pay a sliding scale fee based on that charity's nationwide level of public contributions. Because we find that the Statute passes constitutional muster, we affirm the district court's granting of summary judgment in favor of appellee, the Maryland Secretary of State ("the Secretary").

I.

A. *The Statute*

The Statute in issue is not Maryland's first on the subject. Prior to 1985, Maryland law required charities to register annually and pay a flat fee of $25.00 per year. In 1985, the annual fee was eliminated and replaced with a one-time registration fee of $50.00 with annual renewals at no additional expense. By 1989, however, the Secretary determined that the funds generated through the $50.00 one-time fee fell far short of the actual costs incurred for monitoring and administering charitable organizations in Maryland. In January 1989, House Bill 165 was introduced in the Maryland legislature to accomplish two related goals: (1) to reinstate the annual fee in order to help defray the administrative costs of the renewal system and (2) to replace the flat fee system with a sliding scale based on total

contributions received by the charity in the prior year. In proposing that the sliding scale should be based upon nationwide contribution levels, the Secretary asserted that the sums raised under such a fee system would approximate the costs of administration and enforcement.

The legislation was enacted. Md. Code Ann. Art. 41, § 3-202.[1] In addition to the sliding scale fee, the Statute

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[1]While the complete Charitable Organizations Solicitation Law is lengthy, covering more than twenty pages in the Maryland Code, only the following provisions are directly relevant to the instant constitutional challenge:

> § 3-202. Registration of charitable organizations; required reports.
>
> (a) Every charitable organization located in this State which intends to solicit contributions within or without this State, or every charitable organization which intends to solicit contributions within this State or to have funds solicited on its behalf shall file a registration statement with the Secretary of State . . . prior to or upon the commencement of any solicitation.
>
> . . .
>
> (g)(1) Every charitable organization under this subtitle which files a separate registration statement shall pay an annual fee based upon the level of public contributions collected. The annual fee due is as follows:
>
> | Level of Public Contributions | Annual Fee |
> |---|---|
> | At least $25,000 but less than $50,001 | $50 |
> | At least $50,001 but less than $75,001 | $75 |
>
> (continued...)

imposes a number of further requirements on charitable organizations based in Maryland or seeking to solicit funds in Maryland. Specifically, the Statute requires every charitable organization[2] located in Maryland and every out-ofstate charity that intends to solicit funds in Maryland to file with the Secretary a registration statement and annual reports for each subsequent year in which the charity solicits or operates in Maryland. Md. Code. Ann. § 3-302(a). Where a charity's gross income from all public contributions in the most recent fiscal year equals or exceeds $100,000 and is less than $250,000, the registration statement must be accompanied by an independent public accountant's review of the charity's financial information. Md. Code. Ann. § 3-302(b)(2). Where total contributions to a charity equal or exceed $250,000, an independent certified public accountant's audit of the charity's financial information must be included. *Id.* In addition, if a charity's contributions exceed $100,000, its annual report, which must be filed with the Secretary within six months of the close of the charitable organization's fiscal year, must be accompanied by either an independent certified public accountant's review or an audit. Md. Code Ann. § 3-302(e)(1).[3]

The Statute also vests the Secretary of State with investigatory, enforcement, and emergency powers, including

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[1](...continued)

At least $75,001 but less than $100,001	$100
$100,001 and above	$200

[2]Certain charitable organizations are exempt under Md. Code Ann. § 3-203. This exemption does not apply here.

[3]The Statute imposes a number of other responsibilities on charitable organizations. *See, e.g.*, Md. Code Ann. § 3-204 (regulating contents and filing of contracts with fundraising counsel or professional solicitors), § 3-205 (activity limitations and disclosure requirements), § 3-210 (maintenance of records), and § 3-212 (prohibited acts and practices).

the authority to cancel a charity's registration, to take emergency action, including the issuance of summary cease and desist orders, and to refer cases to the Maryland Attorney General for civil and criminal prosecution. *See* Md. Code Ann. § 3-214.

B. *The Suit*

Appellant Center for Auto Safety, Inc. ("CAS") is a non-profit consumer advocacy organization incorporated in Washington, D.C. Its activities include, among others, engaging in direct-mail solicitations to non-members. CAS estimates that it sends out approximately 200,000 to 250,000 mailings on an annual basis, including 15,000 mailings to Maryland residents. It receives annual contributions totaling in excess of $100,001, and thus must pay an annual fee of $200 to solicit contributions in Maryland. After refusing to pay the $200 fee, CAS brought this suit against Maryland's Secretary of State,[4] claiming that the statutory fee violates CAS's rights under the First Amendment, the Due Process Clause of the Fourteenth Amendment,[5] and the Commerce Clause. The district court granted the Secretary's motion for summary judgment, thereby upholding the constitutionality of the challenged law. This appeal followed.

II.

This case was decided below on the parties' cross-motions for summary judgment. Therefore, the standard of review is *de novo*. *See Overstreet v. Kentucky Cent. Life Ins. Co.*, 950 F.2d 931, 938 (4th Cir. 1991).

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[4]The Secretary of State has statutory responsibility for enforcement of the Statute.

[5]CAS has abandoned this claim.

III.

Central to the Commerce Clause analysis here is whether the Statute constitutes (1) a general revenue tax or (2) a "user fee" assessed to defray the costs of state-provided services. Different constitutional standards apply to each.

General revenue taxes are state taxes levied against interstate commerce to raise general revenue. These taxes raise the difficult problem of "reconciling unrestricted access to the national market with each State's authority to collect its fair share of revenues from interstate commercial activity." *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 269, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987). To assure that revenue taxes do not violate the principle that "no State may discriminate against interstate commerce by enacting a tax which provides a competitive advantage to local business," *id.* (citing *Dean Milk Co. v. Madison*, 340 U.S. 349, 356, 95 L. Ed. 329, 71 S. Ct. 295 (1951)), the Supreme Court has required that any state tax on interstate commerce must be (1) applied to an activity with a substantial nexus with the taxing State, (2) fairly apportioned, (3) nondiscriminatory against interstate commerce, and (4) fairly related to the services provided by the state, in order to pass constitutional muster. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977).

This stringent standard, however, does not apply when the state tax at issue qualifies as a "user fee." "User fees" are taxes or other fees collected by the state as reimbursement for use of state-owned or state-provided facilities or services. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981); *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972). The Supreme Court has drawn a clear distinction between user fees and general revenue taxes, noting that "because [user fees] are purportedly assessed to

reimburse the State for costs incurred in providing specific quantifiable services," they "are not true revenue measures and . . . the considerations applicable to ordinary tax measures do not apply." *Commonwealth Edison*, 453 U.S. at 622 n.12 (citing *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599, 83 L. Ed. 1001, 59 S. Ct. 744 (1939), and P. Hartman, State Taxation of Interstate Commerce 20, n.72 (1953)). The rationale for this distinction is that, where taxes are narrowly drawn to reimburse a state for its expenses, the possibility that the tax will discriminate against interstate commerce is sharply diminished.

To qualify as a user fee, a state tax must (1) reflect a fair, if imperfect, approximation of the cost of using state facilities for the taxpayer's benefit, (2) not discriminate against interstate commerce, and (3)not be excessive in relation to the costs incurred by the taxing authorities. *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 717-20, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972).[6] Tax statutes meeting these three criteria qualify as user fees and therefore pass constitutional muster. *Id.* at 716-717; *see also American Trucking*, 483 U.S. at 289-291.

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[6]Despite CAS's argument to the contrary, *Evansville-Vanderburgh* is still valid, binding precedent. The Supreme Court has signaled no disapproval of the decision, nor any intention to limit or overrule it. To the contrary, the Court has cited and quoted from the decision on several occasions. *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 296, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987) (noting that "the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens."); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981) (citing *Evansville-Vanderburgh* as authority for proper analysis of user fees).

IV.

These principles, applied to the case at bar, point persuasively to the conclusion that the sliding scale fee imposed under the Maryland Statute is a constitutionally sound user fee. To begin with, Maryland's fee structure represents a fair, if imperfect, approximation of the cost of using Maryland facilities and services for the charity's benefit. As the district court found, the record clearly shows that the Secretary's costs of monitoring charities increase with larger charities. This cost increase arises because larger charities generally generate more registration and renewal documents to review, require more research relating to administrative, management, and membership activities, and give rise to more public inquiries, more paperwork requiring data entry, and more investigative effort. Although it is true that any particular large charity may not generate higher costs, the Commerce Clause does not require that user fees be precisely correlated to actual use that a party makes of government services. *See United States v. Sperry Corp.*, 493 U.S. 52, 60, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989); *Evansville-Vanderburgh*, 405 U.S. at 716. Instead, recognizing the insurmountable administrative burdens arising from a more stringent requirement, the Court has required only that the fee be based on a "fair approximation of the cost of benefits supplied." *Sperry*, 493 U.S. at 60 (citing *Massachusetts v. United States*, 435 U.S. 444, 463 n.19, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978)). Here, because a charity's fee is directly related to the workload the charity is expected to create for the Secretary, the sliding scale fee is a fair, if imperfect, approximation of Maryland's costs, thus satisfying the first prong of the *Evansville-Vanderburgh* test.

Next, Maryland's sliding scale fee does not discriminate against interstate commerce. The fee imposed does not differentiate between Maryland-based charities and charities based out-of-state. For example, all charities generating $50,000 in nationwide contributions are subject to the same

registration fee, without regard to location. Nor are the registration fees excessive in relation to the costs incurred by Maryland. The parties do not dispute that the total amount raised through registration fees did not exceed the funds necessary to cover Maryland's administration and enforcement of the Statute. Therefore, because the Statute fulfills the three requirements of the *Evansville-Vanderburgh* standard, it is properly viewed as a user fee.[7]

CAS's principal argument to the contrary is that Maryland does not provide charities with "services," as that term has been used in opinions upholding taxes as "user fees." Citing *Commonwealth Edison* and *Evansville-Vanderburgh*, CAS argues that the user fee analysis is only applicable when a state seeks to recoup the costs of operating a specific state facility or of providing specific quantifiable services. CAS contends that the Statute does not qualify for such treatment because Maryland does not assist charities in their solicitations, for example by providing printing or distribution aids. Further, CAS, which solicits only by mail, does not use Maryland's sidewalks or highways.

Though not without some appeal, this argument ultimately fails. The sliding scale fee, although not the typical user fee, nonetheless fits comfortably within the user fee category. Typical user fees involve users deriving benefits from the use of state facilities such as roads, highways, and airports. Here, charities seeking to solicit in Maryland use the state's apparatus for regulating charities[8]

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[7]Given this conclusion, it is not necessary to consider whether the fee could also be justified as a general revenue tax under other case authority. *See New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 50 (1st Cir. 1984).

[8]Maryland's regulation of charities includes the collection and review of registration and financial information of charities seeking to solicit in Maryland. The Secretary of State's office also

(continued...)

and, as a result, derive a benefit, namely the privilege of soliciting in Maryland where donor confidence is enhanced owing to the state's regulation of charities.[9] But unlike the typical user fee situation, where a user's out-of-state

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[8](...continued)
responds to telephone and written inquiries regarding charities, conducts public education lectures, and investigates complaints about charities. According to the Assistant Secretary of State, the largest single activity in the Office of the Secretary of State is the administration and enforcement of the Maryland laws governing charitable organizations. Four employees staff the Charitable Division of the Office of the Secretary of State, and, whenever the workload demands, employees from other divisions are brought in to supplement the Charitable Division staff.

[9]While the state's regulatory efforts clearly provide a service to the citizenry of Maryland, they also benefit charities seeking to solicit in Maryland by eliminating illegitimate charities and enhancing public confidence in charities. As a result, the level of charitable giving will tend to increase, as citizens are more likely to donate to charities that have been investigated and found to be reputable. In addition, each charity's share of available funds may increase because, as illegitimate charities are weeded out, the amount of available funds will be spread among a smaller pool of charities.

One might query whether a large nationwide charity that solicits from only one Maryland citizen benefits from increased donor confidence more than a small in-state charity that solicits statewide. The short answer to this question is that both enjoy the opportunity to solicit statewide in an environment of enhanced public confidence. It follows, therefore, that a national charity soliciting from only one Maryland citizen either (1) chooses not to take full advantage of the statewide increased consumer confidence, or (2) is unsuccessful, for some reason, in its solicitation of other Maryland citizens. *See Evansville-Vanderburgh*, 405 U.S. at 716-17 (a fee passes constitutional muster if it "is based on some fair approximation of use *or privilege of use* . . . .") (emphasis added).

activities are irrelevant, the out-of-state activities of the assessed charities are directly relevant to Maryland's regulatory efforts. To protect and inform her citizens, Maryland must examine the overall activities of charities, not just the charities' activities that occur within Maryland.[10] For all these reasons, the Statute's sliding scale fee is correctly viewed as a "user fee," paid by charities for the benefits received from Maryland.

CAS also challenges the application of user fee analysis here because the Secretary does not keep the registration fees in a separate fund, but rather turns them over to the state treasury. This argument also fails, for *Evansville* makes clear that it is immaterial where the funds are deposited and whether those specific funds are the funds eventually used to effectuate the Statute's purpose. *Evansville-Vanderburgh*, 405 U.S. at 720; *see also New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 49 (1st Cir. 1984) (noting that "the Commerce Clause does not require states or courts to trace individual dollars").

In sum, the Statute's sliding scale fee system meets the *Evansville-Vanderburgh* test for user fees. It is, therefore, a user fee that does not violate the Commerce Clause.

V.

Next, we must determine whether the Statute violates the First Amendment. To begin, it is clear that charitable solicitations, such as those conducted by CAS, involve a variety of speech falling within the scope of First

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[10]For example, suppose a large national charity carefully uses 90% of the modest amount of funds it raises in Maryland for charitable purposes, but funnels 75% of the much larger amount of funds it raises nationwide for its directors' extravagant salaries. In short, Maryland and her citizens surely have a legitimate interest in what this and other charities do with the funds they raise outside of Maryland.

Amendment protection. *See Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 632, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980). And, it is equally clear that while the exercise of Constitutionally protected activities may not be taxed, it may be regulated, provided the regulation is narrowly tailored to achieve a legitimate governmental interest, is content-neutral in terms and effect, and does not unduly burden speech. *Cox v. New Hampshire*, 312 U.S. 569, 85 L. Ed. 1049, 61 S. Ct. 762 (1941), illustrates this principle. There, the Supreme Court reviewed a New Hampshire statute requiring that a special license be obtained prior to any public parades or processions on public streets. License applicants were required to pay a sum not to exceed $300.00 a day "for the use of the city or town." In upholding the statute, the Supreme Court affirmed the principle that fees that serve not as revenue taxes, but rather as means to "meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed," do not violate the Constitution. *Cox*, 312 U.S. at 577; *see also Murdock v. Pennsylvania*, 319 U.S. 105, 113-14, 87 L. Ed. 1292, 63 S. Ct. 870 (1943) (striking down a license tax which was not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question"); *Streich v. Pennsylvania Com. on Charitable Organizations*, 579 F. Supp. 172, 177 (M.D. Pa. 1984) ("Nominal fees imposed to defray the costs of policing the activities in question are allowed."). An important ingredient in the Court's conclusion was the recognition that "there is no evidence that the statute has been administered otherwise than in the fair and non-discriminatory manner which the state court has construed it to require." *Cox*, 312 U.S. at 577.

But the power to impose a fee or require a permit in the speech context has important limits, as *Forsyth County v. Nationalist Movement*, 120 L. Ed. 2d 101, 112 S. Ct. 2395, 2399 (1992), lucidly illustrates. There, an ordinance required that private organizations and groups obtain a

license prior to engaging in demonstrations on public lands. License applicants were required to pay a fee in an amount to be fixed by the County's Board of Commissioners, but not to exceed $1000.00 per day. The county administrator was empowered to adjust the fee amount "in order to meet the expense incident to the administration of the Ordinance and to the maintainance of public order in the matter licensed." *Id.* In striking down the ordinance as facially invalid, the Court noted that ordinances regulating speech and imposing fees must not delegate overly broad licensing discretion to a government official, because "'such discretion has the potential for becoming a means of suppressing a particular point of view.'" 112 S. Ct. at 2401 (quoting *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981)). Significantly, the Supreme Court found that the ordinance, as construed by the County, was not content-neutral because the fee was based upon the administrator's discretionary assessment of the amount of hostility likely to be created by the speech based on its content. 112 S. Ct. at 2403.

The Statute at issue and the fees it imposes represent a narrowly tailored governmental regulation of speech, one that is essentially similar to that upheld in *Cox*, and yet sharply different from the ordinance struck down in Forsyth County. In contrast with the ordinance struck down in Forsyth County, where the administrator "based the fee on his own judgment of what would be reasonable," *Id.* at 2402, Maryland licensing officials are afforded no discretion in imposing an appropriate fee. Instead, the fees assessed by Maryland are statutorily set in fixed steps corresponding to a charity's nationwide contribution level. Accordingly, Maryland officials cannot manipulate the Statute's fee discriminatorily in order to censor or limit a charity's First Amendment rights. Moreover, the fees assessed by Maryland are content-neutral. Charities generating comparable levels of nationwide contributions are subject to the same fee, regardless of the nature of the causes espoused

by a charity and regardless of the government's opinion of the causes.

Like the fees imposed in *Cox*, the fees assessed by Maryland under the Statute are narrowly tailored to further a legitimate governmental purpose. In *Cox*, the fees enabled the state to police public demonstrations and maintain the public order; here, the fees enable the state to prevent fraud by charities soliciting funds in Maryland. As in *Cox*, the Maryland fees are calibrated to approximate the costs of administering the Statute, and the revenues raised by the fees do not exceed these costs. As such, the fees do not unduly or impermissibly burden speech. And finally, as in *Cox*, there is no evidence that the Statute has been applied in a discriminatory manner.

Therefore, because the Statute's sliding scale is narrowly tailored to match the costs incurred by Maryland in implementing the Statute, because the Secretary does not exercise discretion in the imposition of the fee, and because the fees imposed are content-neutral and do not unduly burden speech, the Statute does not violate the First Amendment.

Accordingly, the district court's order granting summary judgment for the Secretary is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CENTER FOR AUTO SAFETY, INC.	)	
v.	)	CIVIL NO. L-92-637
TYRAS S. ATHEY, in his official capacity as Secretary of State of Maryland	)	

MEMORANDUM

I. INTRODUCTION

The State of Maryland, like numerous other states, imposes certain requirements on charitable organizations that use the mails to solicit funds within the state. *See generally* Md. Code Ann. art. 41 §§ 3-201 to 3-219 (the "Solicitation Law").

The Solicitation Law requires that charities that intend to solicit contributions within Maryland file an initial registration statement with the Maryland Secretary of State, and thereafter file annual reports. If a charity fails to comply with the law, the Secretary of State has a range of options, including 1) cancelling the registration of the violator, 2) summarily issuing a cease and desist order, 3) referring the matter to the Attorney General for civil enforcement, and/or 4) referring the matter to the appropriate State's Attorney for prosecution. *See* Solicitation Law § 3-214.

Prior to July 1, 1989, the Solicitation Law required every charity under its jurisdiction to pay a flat annual fee of $50.00.

Effective July 1, 1989, Maryland's legislature amended the Solicitation Law to provide for determining the annual fee a charity must pay by using a sliding-scale, based on the

level of the charity's nationwide level of "public contributions." Solicitation Law § 3-202(g)(1).

Thus, charities that annually receive public contributions of less than $25,000 pay no fee. Those charities receiving contributions between $25,000 and $50,000 must pay an annual fee of $50.00. Charities receiving contributions of between $50,001 and $75,000 must pay an annual fee of $75.00. Those receiving between $75,001 and $100,000 must pay an annual fee of $100.00. And those receiving over $100,000 must pay an annual fee of $200,00. *Id.* Contributions for purposes of this law include those contributions solicited from anywhere in the United States. (Def. Resp. to Int. No. 9).

Plaintiff, Center for Auto Safety, Inc., is a national consumer advocate organization that engages in numerous activities, the goal of which is to improve automobile safety, efficiency and quality. Plaintiff challenges the sliding-scale fee provision as violative of the First Amendment, the Commerce Clause and the Due Process Clause. It seeks a declaration that the provision is unconstitutional, injunctive relief to prevent the law from being enforced against it, and other relief.

Defendant is the Maryland Secretary of State, who has statutory responsibility for overseeing the enforcement of the Solicitation Law.

Before the Court are plaintiff's and defendant's motions for summary judgment. For the reasons stated in this Memorandum, the Court will DENY plaintiff's motion for summary judgment, and GRANT defendant's motion for summary judgment.

II. STANDARDS FOR SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the moving party can show that "there is no genuine issue of material fact" and that he is "entitled to

judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-32 (1986). In this case, the defendant, as the moving party, bears the initial burden of proof, and the Court must determine whether, viewing the evidence in the light most favorable to the plaintiff, "a fair-minded jury could return a verdict for the [plaintiff]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). If the movant makes this preliminary showing, the burden shifts to the opposing party to delineate, with supporting admissible evidence, an issue of material fact. A "mere scintilla of evidence in support of the plaintiff's position" shall not suffice. *Anderson*, 477 U.S. at 252.

III. DISCUSSION

A. The First Amendment Test

Plaintiff's first claim is that the fee provision violates the First Amendment to the United States Constitution. As a preliminary matter, the Court finds well-supported plaintiff's contention that "charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment." *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 959 (1984). It is also true, however, that the solicitation of charitable contributions are undoubtedly subject to reasonable regulation. *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980). While the exercise of Constitutionally protected activities may not be taxed, *Murdoch v. Pennsylvania*, 319 U.S. 105 (1943), it may be regulated. *Streich v. Pa. Com'n. on Charitable Organizations*, 579 F.Supp 172 (1984). Nominal fees imposed to defray the costs of policing the activities in question are allowed. *Id.* The state bears the burden of showing that any regulation of such solicitations is narrowly drawn to serve a sufficiently strong subordinating interest

that the government is entitled to protect.[1] *Schaumberg*, 444 U.S. at 636-37.

It is not contested that the First Amendment extends to the type of solicitations involved in the instant case. Thus, the issue for the Court to decide is whether the fee provision is both reasonable and narrowly drawn to further a substantial interest that the state is entitled to protect.

The substantial state interest in this case is protecting the public from fraud by regulating the charities that solicit it for funds. The importance of this interest is not challenged. What plaintiffs challenge is the relationship of the fee provision to this substantial state interest.

B. Why The 1989 Fee Schedule Was Enacted

Before the enactment of the 1989 amendment to the Solicitation Law, the funds generated to regulate the compliance of charities with the law were inadequate to meet the task, and the process was subsidized by the taxpayers of the state of Maryland. Elson Decl., paragraphs 5, 6. For example, in 1987, the $9,150.00 generated was a mere fraction of what was necessary to meet this need.

The legislative record sheds light on the purpose of the 1989 fee provision. The Secretary of State's office justified the provision to the Governor's office on the ground that the moneys raised would approximate the cost of administering and enforcing the charitable organizations law. Elson Decl. paragraph 7 and Elson Exhibit 2. Then-Secretary of State Winfield Kelly also offered the same explanation of the

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[1]The Court notes that *Schaumberg* involved an outright ban on solicitations by charitable organizations that did not use at least 75 percent of their receipts for "charitable purposes." In the instant case, the challenged requirement is payment of a nominal fee, the stated purpose of which is to defray the costs of regulating charitable organizations pursuant to state law.

purpose of the bill in his March, 1989 testimony before the Senate Judicial Proceedings Committee.[2] Elson Decl. paragraph 8 and Elson Exhibit 4.

Despite the fee schedule, the Court finds that the actual cost of carrying out the provisions of the Solicitation Law exceeds the amount of revenue generated by the fees.[3]

C. The Maryland Fee Provision Is Tailored To Providing The Funds To Carry Out Its Purpose

The Court finds that the sliding scale fee provision is a reasonable means of raising funds from charities consistent with the cost of monitoring them. This scheme raises approximately what is needed for Maryland to fund this policing effort. Additionally, it apportions the costs of monitoring between the charities on the basis of the state's expected cost of monitoring that charity.

Ms. Deborah Elliott's Declaration concerning her activities as a reviewer of the documents filed by charities is informative on the process by which registrations and annual reports are received and processed. She stated that the larger the charity, the more documentation it is required to file, and

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[2]Secretary Kelly offered virtually the same testimony before the Constitutional and Administrative Law Committee of the House of Delegates earlier in 1989. In addressing the question of the sliding-scale fee, Secretary Kelly testified, on both occasions, that the new fee provision would calculate "a fair fee which will generate income which approximates the cost to the state of administering and enforcing the charitable solicitations act."

[3]Although plaintiff expresses concerns about defendant's recalculation of the costs of carrying out the Solicitation Law, the Court credits the Secretary of State's recalculation as a good faith effort to include the full range of administrative costs in this calculation.

thus the longer it takes to review the documentation.[4] The Declaration of Alicia Moran, who also reviews the documents charities are required to file, also explains why larger charities have greater costs associated with monitoring them. For example, large charities generate a greater number of inquiries from donors and potential donors, including those from out-of-state.[5] Moran Supp. Decl., paragraph 3.

D. Summary of the First Amendment Issue

The Court finds that: (i) the fee provision of the Solicitation Law was proposed and passed with the intent and justification that it would cover the expenses of administering the law, (ii) the fees involved raise part of, but do not exceed, the costs of administering the Solicitation Law; and

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[4]The Declaration of Deborah Elliott establishes the following uncontroverted facts: 1) It takes more time to review the submissions of a charity with greater nationwide fundraising due to the additional paperwork which must be submitted by such an organization; 2) It takes more time to enter pertinent information into the Department's computer data bases for a charity with greater national fundraising; 3) Reviewing the submissions of a charity with greater fundraising also takes more time because of their more frequent use of professional fundraisers, which itself calls for additional review; and 4) Whether the charity raises the majority of its money in-state or out-of-state, the same nationwide data is recorded to be made available to interested persons.

[5]Ms. Moran's Supplemental Declaration notes that nationwide charities often provide their Maryland registration information in connection with their solicitations outside of Maryland, generating a fairly significant workload in responding to inquiries from out-of-state persons. This level of inquiry has no relation to the organization's operations in Maryland, but rather is more closely connected to the scale of the organization's fundraising on a national basis.

(iii) the distinction between the fees for larger and smaller organizations is sufficiently tailored to the amount of work and expense required by the State to monitor and respond to inquiries relating to the organization in question. Therefore, this regulation of speech is reasonable, and does not violate the First Amendment.

B. Commerce Clause

Plaintiff next challenges the provision as violating the Commerce Clause. Plaintiff correctly notes the tension in this area of law. Specifically, there is the "distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage ..." *Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949).

The Court begins by noting that there is no distinction in Maryland's Solicitation Law between the treatment of in-state and out-of-state charities. A Maryland-based charity which raises $50,000 must meet the same requirements and pay the same fees as a New York-based charity which raises $50,000 and wishes to solicit contributions in Maryland. Consequently, it is difficult to see how this provision places a burden on interstate commerce.

It is clear that the annual fee is not a tax on the receipts of charitable organizations. It is a fee calculated to meet the costs of the state in erecting a protective structure to protect people from unscrupulous organizations. The Court believes that the proper approach to examining the annual fee provided for in the Solicitation Law is to view it not as a tax on receipts generated by a constitutionally protected activity, but rather as a user fee for a service provided by the state.

The Court finds that the defendant has sufficiently established the nexus between the fees charges and the cost of operating the program, and has justified the varying fees

by cost per level of fundraising, to establish that the fee is indeed not a tax but a user fee designed to fund a program that protects the state's citizens and benefits the charities subject to its provisions.[6]

The Court further notes that "it has never been required that a user fee be precisely calibrated to the use that a party makes of Government services." *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). The government need not justify with precision the cost of its services. *Id.* Rather, the user fee must be a "fair approximation of the cost of benefits supplied." *Massachusetts v. United States*, 435 U.S. 444, n. 19 (1978) (upholding a flat registration fee assessed by the Government on civil aircraft). When user fees are applied to a large number of parties, it is possible that a user will be charge more or less than it would under a perfect user-fee system, but the Supreme Court has declined to impose a requirement that the government "give weight to every factor affecting appropriate compensation..." *Id.* Therefore, the Court finds, as a matter of law, that the Maryland fee provision is in fact a user fee, not a tax, and does not burden interstate commerce, nor does it violate the commerce clause

The law protects the welfare of persons solicited for contributions to charity. It offers no preferential treatment

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[6]The legislative history of the sliding-scale fee provision includes testimony from numerous charitable organizations who testified as to the benefit they perceived for their organizations from the new statutory scheme. To give but one example, when the bill was before the legislature for consideration, United Way Community Services supported the bill because it extended "as many protections as possible to our donors as they exercise their right to give." Elson Exhibit 7.

to in-state organizations.[7] Thus, the law does not violate the Commerce Clause.

C. Due Process

Plaintiff's final contention is that the fee provision violates the Due Process Clause. The essence of plaintiff's argument is that defendant is assessing them a fee for a service from which it derives no benefit.

The Court finds that plaintiff does in fact receive a benefit from the state of Maryland. The state reviews and accepts reports from charities, makes them available to the public, provides a public repository for questions and concerns about charitable fundraising organizations and gives the people of Maryland, as well as other states, a method by which to obtain information about and have confidence in those organizations which the state of Maryland has registered. The process protects legitimate charities and fosters charitable giving.

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[7]Plaintiff argues that the fee provision discriminates against out-of-state charities because it imposes a larger fee on organizations with larger receipts, and most such organizations are from outside the state of Maryland. The Court disagrees with the logic of this contention.

IV. CONCLUSION

For the reasons given in this memorandum, the plaintiff's motion for summary judgment is DENIED, and the defendant's motion for summary judgment is GRANTED. An order will follow.

Done this 28th day of September, 1993.

/s/
Benson Everett Legg
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CENTER FOR AUTO SAFETY, INC.	)	
v.	)	CIVIL NO. L-92-637
TYRAS S. ATHEY, in his official capacity as Secretary of State of Maryland	)	

ORDER

For the reasons given in a Memorandum of even date, it is HEREBY ORDERED THAT:

Plaintiff's motion for summary judgment is DENIED, and

Defendant's motion for summary judgment is GRANTED.

The Clerk is hereby ORDERED to enter judgment in this case in favor of the defendant, and to close the case.

IT IS SO ORDERED this 28th day of September, 1993.

/s/
Benson Everett Legg
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CENTER FOR AUTO SAFETY, INC.	)	
v.	)	CIVIL NO. L-92-637
TYRAS S. ATHEY, in his official capacity as Secretary of State of Maryland	)	

JUDGMENT

For the reasons given in a Memorandum and Order of the Court of even date, and

Plaintiff's motion for summary judgment having been DENIED, and

Defendant's motion for summary judgment having been GRANTED.

Judgment is hereby entered in favor of the defendant against the plaintiff.

DONE this 28th day of September, 1993.

/s/
Patricia Cage
Deputy Clerk